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# DEFENSIVE DEFENSE LAWYERING OR DEFENDING THE CRIMINAL DEFENSE LAWYER FROM THE CLIENT\*

*John Wesley Hall, Jr.\*\**

We have all heard of the assault on the independence of the criminal defense bar usually manifested by prosecutors subpoenaing lawyers to be witnesses on fee information,<sup>1</sup> issuing search warrants for lawyer's offices,<sup>2</sup> and by sending cooperating and wired codefendant- and witness-informants into lawyer-client meetings to gather information about the defense.<sup>3</sup> A 1985-86 study for the National Association of Criminal Defense Lawyers (NACDL) showed that a substantial percentage of criminal defense lawyers justifiably feel that they are targets of investigations and prosecutions.<sup>4</sup>

This article addresses the underlying problems from this last form of the assault on the independence of the criminal defense bar, using defendants, codefendants, and witness-informants against the criminal defense lawyer. This form of assault is far more intimidating

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Authors usually feel uncomfortable citing themselves, and this is no exception. I do, however, want those readers whose curiosity is piqued by this talk to look things up.

1. J. HALL, *PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER* § 11.1 (1987) [hereinafter, *PROFESSIONAL RESPONSIBILITY*] (citing, *inter alia*, Genego, *Risky Business: The Hazards of Being a Criminal Defense Lawyer*, 1 *CRIM. JUST.* 2 (1986)).

2. *PROFESSIONAL RESPONSIBILITY*, *supra* note 1, § 11.10.

3. See, e.g., *Weatherford v. Bursey*, 429 U.S. 545 (1977); *Briggs v. Goodwin*, 698 F.2d 486, *vacated*, 712 F.2d 1444 (D.C. Cir.), *cert. denied*, 464 U.S. 1040 (1983); *United States v. Rispo*, 460 F.2d 965 (3d Cir. 1972).

4. The NACDL study showed that 80% of the criminal defense lawyers responding to the survey felt that the "Department of Justice has intentionally adopted a practice of investigating and prosecuting attorneys who represent defendants in criminal cases as a means of . . . discouraging zealous representation of criminal defendants." Genego, *Reports from the Field: Prosecutorial Practices Compromising Effective Criminal Defense*, 10 *THE CHAMPION* (No. 4) 7, 12, 15 (May 1986).

in its impact on defense lawyers because the stakes are much higher and it is so much more insidious in its nature.

Most lawyers are unaffected by the horror stories of misconduct I will discuss because they would never even think about doing something that would get them in ethical or criminal trouble. There are a substantial number of lawyers in this country, however, who practice on the "edge" of misconduct. They are the primary targets of this article. Nevertheless, every criminal defense lawyer should consider the implications here which affect us all.

## I. THE SOURCE OF THE PROBLEM

The source of this particular problem is the criminal defense lawyer's client. Clients sometime figure out, or are told, that they can cut themselves a better deal with the government if they can trade their lawyer for themselves. This is, I submit, a forgotten area of lawyer-client relations. The lawyer risks suspension from the practice of law, disbarment, indictment, conviction, imprisonment, and maybe even some public humiliation.

The first three rules of a successful and ethical criminal defense practice are: (1) get the fee in advance; (2) the lawyer should not be the one to go to jail; and (3) always be fair and honest to the client, the court, your opponent, and yourself.<sup>5</sup> This article addresses the second and third rules.

How do you protect yourself from this situation? It is easier than you might think: *Always remember rules two and three.* Stated another way, you better know and understand the laws dealing with obstruction of justice and subornation of perjury. Your protection begins with the first meeting with the client.

Lawyers may think they are practically immune from criminal prosecution, but, believe me, they are not. The greatest risk of exposure comes from the client and their friends, family, and witnesses to whom you talk. It is foolhardy to think that the lawyer can tell the client anything and remain insulated from a criminal defendant on whose allegations one would think no police officer or prosecutor would supposedly believe or rely.<sup>6</sup>

How do you deal with these people? It is simple, and the rule is the reason: *Say nothing or do nothing that you would be afraid or ashamed to read in the newspaper some day.* Stated more bluntly, if

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5. PROFESSIONAL RESPONSIBILITY, *supra* note 1, § 1.10.

6. *Id.* § 5.33.

the police or a grand jury listened to this conversation, what would they think?

You must treat every client and their friends, relatives, witnesses, and codefendants as potential informants. You must deal at arms' length with them at all times, and you must always consider the possibility they are "wired" wherever you talk to them, be it in jail, your office, some other law office, or even in the courthouse. Treat all discussions with them as you would a conversation "on the record" with a reporter.<sup>7</sup>

This may sound overly "Big Brotherish," but it is not. I am only being pragmatic. The NACDL study showed that 39% of all criminal defense lawyers responding believed that the government had sent a confidential informant into defense meetings or to them as a prospective client. Several lawyers responding even believed that the government informant tried to engage the lawyer in misconduct.<sup>8</sup> I was one of those respondents.<sup>9</sup>

Certainly there is risk of prosecution from overt statements and conduct like "tell witness A to lie." Few of us would have sympathy with a lawyer who said that. But, even honest lawyers are at risk if they do not handle the client properly when it becomes apparent that the client proposes something illegal. There is also risk of prosecution if you or your client talk vaguely or in circles to avoid the obvious, talk in code words, or drop hints, and by refusing to say "no" when common sense and ethics require it.

When the client proposes criminal or unethical conduct, you must respond immediately, firmly, and clearly that you will not do it and you must explain why. Better yet, show the client a copy of the relevant statute from the state or federal criminal or ethics code and let the client read the statute while you tell them why what they propose to do is a crime for either of you, or unethical for you.<sup>10</sup> If you hesitate and equivocate in your responses, someone listening to your responses or reading a transcript of the conversation may mistake your equivocation for acquiescence in the client's proposed criminal conduct. That alone may be enough to get you indicted for obstruc-

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7. *Id.*

8. Genego, *supra* note 4, at 13.

9. See *infra* text accompanying notes 35-37.

10. PROFESSIONAL RESPONSIBILITY, *supra* note 1, § 5.33, at 144:

When a client acts as though he or she expects assistance not permitted by the ethical rules, criminal law, or other law, the lawyer has a duty both to the system of justice and to him or herself to advise the client in no uncertain terms that the lawyer cannot give that assistance and [has a duty to explain] why.

tion of justice or subornation of perjury.<sup>11</sup>

Rule 1.2(e) of the Rules of Professional Conduct, promulgated in 1983 and now the law in half the states, addresses this issue as if it is a minor matter:

When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Rule 1.2(e) states the obvious even to the uninitiated among us. The *why* and *how* is important, too, and that is what this article addresses.

The risk of indictment and prosecution exists even when you are scrupulously ethical and lawful. When the client consults with a lawyer about a crime in progress or a potential future crime, the lawyer absolutely must be sensitive to the fact that the lawyer's advice, if wrong, and maybe even when it is legally and ethically correct, could subject the lawyer to investigation or indictment for being a conspirator or accessory after the fact, for hindering prosecution, or for concealing physical evidence. These are the most difficult questions criminal lawyers ever face, and, when the problem arises, the lawyer must consider his or her own potential criminal exposure.<sup>12</sup> When circumstances require, or when you have any doubt at all, to quote Nancy Reagan, "Just say no."

## II. HANDLING THE PROBLEM

What do you do about these situations? Do you close your eyes, ears, and mouth and let the client commit the crime hoping he does not get arrested? Or do you counsel against it?<sup>13</sup> Is your silence enough to protect you from criminal liability? Does being a lawyer and officer of the court impose a legal duty under the criminal law to take affirmative action to prevent a crime from occurring?<sup>14</sup>

*Witness Tampering:* Your client says "Witness B is going to say such-and-such about me. I'm going to talk to him and get him to not be so positive against me. He knows the truth." Worse, your client says "I'm going to show him why he needs to change his story." Or worse, your client says "I'm going to pay him to shut up." Even

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11. *Id.* n.9.

12. *Id.* at 145.

13. *See infra* note 27.

14. Here, I exclude test cases raising a bona fide question of the validity of a statute. *See* Rule 1.2(d) of the Rules of Professional Conduct; PROFESSIONAL RESPONSIBILITY, *supra* note 1, § 5.33, at 144 n.6.

worse, your client says "I'm going to kick his \_\_\_\_\_ [and show him who's boss]."

You must read the Federal Victim and Witness Protection Act of 1982, 18 U.S.C. § 1512(b)-(d). This Act is required reading for every criminal defense lawyer appearing in federal court, and it will put the fear of God in you.<sup>15</sup> The Act provides in subsection (b) that intimidation or misleading conduct toward a possible witness to "influence, delay, or prevent" testimony or to withhold, alter, or destroy a "record, document, or other object" is a felony.<sup>16</sup> Subsection (c) of the Act provides that intentional harassment of a possible witness to hinder, delay, prevent, or dissuade the witness from attending or testifying at an official proceeding or reporting a violation of the law is also a felony.<sup>17</sup>

15. For you nonbelievers, make that the Department of Justice.

16. 18 U.S.C. § 1512(b) (Supp. IV 1986) provides:

(b) Whoever knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined not more than \$250,000 or imprisoned not more than ten years, or both.

17. 18 U.S.C. § 1512(c) (Supp. IV 1986) provides:

(c) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecuting or proceeding; or attempts to do so, shall be fined not more than \$25,000 or imprisoned not more than one year, or both.

"Misleading conduct" is defined in terms strikingly similar to the federal securities fraud laws<sup>18</sup> as "knowingly making a false statement," omitting information to cause a part of a statement to be misleading, creating a false impression, or creating a false document or other object which is to be relied upon by others.<sup>19</sup>

Under prior law, the government had to prove that the defendant had a corrupt motive.<sup>20</sup> Now, the government need only prove that the defendant sought to influence testimony. This statute considerably lessens the government's burden of proof.<sup>21</sup> In addition, the section on misleading conduct will put the onus on lawyers to be straight-forward and honest with all witnesses or be guilty of a felony.<sup>22</sup> Now it is only an affirmative defense that the purpose of the defendant was to get the witness to tell the truth.<sup>23</sup> That is, you can have the purpose of bringing forward the truth and still be guilty of a felony under this statute.<sup>24</sup> In fact, a lawyer in California was indicted under this statute for telling witnesses, for example, that they did not have to talk to government officers without consulting a lawyer. Since lawyers have a right to tell people such things, how chilling will the threat of prosecution be to zealous advocacy?

*Subornation and Perjury:* Your client says he has a witness who

18. It has been noted that this section closely follows federal securities fraud laws. Jeffress, *The New Federal Witness Tampering Statute*, 22 AM. CRIM. L. REV. 1, 9 (1984).

19. 18 U.S.C. § 1515(a)(3) (Supp. IV 1986) provides as follows:

[T]he term "misleading conduct" means

(A) knowingly making a false statement;

(B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;

(C) with the intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;

(D) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or

(E) knowingly using a trick, scheme, or device with intent to mislead.

20. See, e.g., *United States v. Howard*, 569 F.2d 1331, 1333-35 (5th Cir.), cert. denied, 439 U.S. 834 (1978); *Knight v. United States*, 310 F.2d 305 (5th Cir. 1962).

21. PROFESSIONAL RESPONSIBILITY, *supra* note 1, § 21.9.

22. *Id.* § 21.10.

23. 18 U.S.C. § 1512(d) (Supp. IV 1986) provides:

In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

This section does not unconstitutionally shift the burden of proof. *United States v. Clemons*, 658 F. Supp. 1116 (W.D. Pa. 1987), *aff'd*, 843 F.2d 741 (3d Cir.), cert. denied, 109 S. Ct. 97 (1988); *United States v. Kalevas*, 622 F. Supp. 1523 (S.D.N.Y. 1985).

24. PROFESSIONAL RESPONSIBILITY, *supra* note 1, § 21.10.

can prove that he did not commit the crime. This witness comes into your office, and you question him. Initially you feel that this witness is probably lying, but you are not sure, and logically, you suspect that your client is attempting to suborn perjury. By the time trial comes around, you know beyond a reasonable doubt that this witness is lying. Do you put him on the stand even when you feel the prosecution cannot contradict the witness?

Initially, when you merely believe that the witness is *probably* lying, you do not commit a crime or ethical violation by putting the witness on the stand, and, in fact, you have an ethical duty to put the witness on the stand. I submit that it is not the lawyer's place to decide whether a witness is lying unless the lawyer has an actual belief beyond a reasonable doubt that the witness is lying.<sup>25</sup> If you know in your own mind that the witness is lying, you have an obligation not to promote the perjury. You must decline to put the witness on the stand or limit their testimony to truthful matters. If you do promote perjury, you could be disciplined or even prosecuted for promoting or advancing the perjury.<sup>26</sup>

*Taking the Proceeds of Crime:* Suppose your client, wanted for a bank robbery, comes into your office to retain you and pay a fee. He produces stacks of bills with money wrappers from the bank that was robbed. Or worse, the client produces money with red dye on it. In either case, do you take it? *NO.*<sup>27</sup>

Similar situation: The client tells you that he is to be indicted in a continuing criminal enterprise (CCE)<sup>28</sup> or racketeering (RICO)<sup>29</sup> case and the charges will include allegations that he made hundreds of thousands of dollars as a drug dealer. He offers you a \$100,000 retainer in cash. Do you take it?

Some of us say that the presumption of innocence applies not only to the defendant but also to his money. Do you have a duty to ask about the source of money? Should you remain consciously igno-

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25. *Id.* § 24.6. See *United States v. Long*, 857 F.2d 436, 445-46 (8th Cir. 1988).

26. *Id.* Ch. 23.

27. See 18 U.S.C. § 2113(c) (Supp. IV 1986) (discussed in PROFESSIONAL RESPONSIBILITY, *supra* note 1, § 25.7).

A lawyer in Tennessee was convicted of taking the proceeds of a bank robbery in such a case in *United States v. Scruggs*, 549 F.2d 1097 (6th Cir.), *cert. denied*, 434 U.S. 824 (1977).

An Arkansas lawyer was convicted in federal court of, *inter alia*, conspiracy to commit bank robbery for taking red dyed money received from his client-co-conspirator. His downfall likely came when he deposited the red dyed money into his own bank account. *United States v. Probst*, 792 F.2d 111 (8th Cir. 1986) (later appeal).

28. 21 U.S.C. § 848 (Supp. IV 1986).

29. 18 U.S.C. §§ 1961-1963 (Supp. IV 1986).

rant?<sup>30</sup> If you thought the witness tampering statute was bad, you should see the Money Laundering Control Act of 1986.<sup>31</sup> All criminal defense lawyers must be fully aware of this Act. The Act makes it a crime to take money from a person knowing that the money came from certain violations of federal law including drug crimes, CCEs, RICO violations, bribery, bank crimes, and others.<sup>32</sup> The former Meese Administration of the Department of Justice had stated in meetings with officials of the National Association of Criminal Defense Lawyers in 1987 and 1988 that lawyers will not be held to the same standards as other recipients of the proceeds of crime in recognition of the client's need to obtain counsel of choice and the fact that lawyers should not be forced to inquire into the source of funds. In addition, the government, on several occasions, has been willing to waive possible forfeiture of attorney's fees in RICO cases.<sup>33</sup>

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30. 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 14.09 (3d ed. 1977):

The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of the fact.

It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

31. 18 U.S.C. § 1956(c)(7) (Supp. IV 1986) (discussed in PROFESSIONAL RESPONSIBILITY, *supra* note 1, § 6.15).

32. The list in § 1956(c)(7) is actually much longer. It includes:

offense[s] under section 152 (relating to concealment of assets; false oaths and claims; bribery); section 215 (relating to commissions or gifts for procuring loans), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 511 (relating to securities of States and private entities), section 543 (relating to smuggling goods into the United States), section 641 (relating to public money, property, or records), section 656 (relating to theft embezzlement, or misapplication by bank officer or employee), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 875 (relating to interstate communications), section 1201 (relating to kidnapping), section 1203 (relating to hostage taking), section 1344 (relating to bank fraud), section 2113 or 2114 (relating to bank and postal robbery and theft) of this title [18], section 38 of the Arms Export Control Act (22 U.S.C. 2778), section 2 (relating to criminal penalties) of the Export Administration Act of 1979 (50 U.S.C. App. 2401), section 203 (relating to criminal sanctions) of the International Emergency Economic Powers Act (50 U.S.C. 1702), or section 3 (relating to criminal violations) of the Trading with the Enemy Act (50 U.S.C. App. 3).

18 U.S.C. § 1956(c)(7) (Supp. IV 1986).

33. See 18 U.S.C. §§ 1956, 1957 (Supp. IV 1986) (discussed in PROFESSIONAL RESPONSIBILITY, *supra* note 1, §§ 6.15-16). The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6182, signed by the President on November 18, 1988, exempts from coverage under § 1957 monetary transactions "necessary to preserve a person's right to representation as guaranteed

Nevertheless, the presumption of innocence with respect to money is overcome in the previous examples on the bank robbery proceeds and the dyed money. The example of the apparent drug money presents a closer question. You can probably accept it safely. If, however, the client tells you that the money is the proceeds of crime, you would be wise not to take it. Why? What happens if the client later tells the police that you knew that the money was proceeds of a crime? What will the police do?<sup>34</sup> Tell the client to come back with some "clean" money, and you will welcome him with open arms.

*Lawyer as Participant:* Suppose the client comes in and says he has a kilo of cocaine and \$50,000 in his safe deposit box. The client wants advice about what to do with it before the police, who are likely already suspicious, obtain a search warrant.

Any advice you give in this situation could very well be unethical or criminal or get the client arrested. The client is in unlawful possession of drugs at the time. You must be careful to avoid possession yourself. If you advise the client to move the drugs, you are guilty of a crime.<sup>35</sup> If you move the drugs yourself, you are guilty of a crime.<sup>36</sup> If you advise the client to leave it there and abandon it, bank officials will eventually find it and they will surely tell the police.

I once had a walk-in client ask such a question. The first questions that went through my mind were whether he was wired and whether this was a sting. No matter what advice you give in this situation, you could get in trouble. Tell the client you cannot give any advice, explain why, and show them the door.<sup>37</sup>

*Tampering with Evidence:* If the client brings you a murder weapon, lays it on your desk, and asks you for advice about what to do with it because he does not want it, what do you do? Should you hold the gun in your safe and (a) promise you'll turn it over after trial or (b) say you'll get rid of it?

In either case you could be charged with a crime. If you turn it

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by the sixth amendment to the Constitution." Prosecution is still possible under § 1956 where an attorney has a specific intent to launder money or promote some underlying criminal activity.

34. See, e.g., *United States v. Scruggs*, 549 F.2d 1097 (6th Cir.), cert. denied, 434 U.S. 824 (1977) (conviction of lawyer for receipt of proceeds of a bank robbery which the lawyer had good reason to believe came from a bank robbery which the lawyer lied to the FBI about and then destroyed; the client told the government about the money).

35. See 18 U.S.C. §§ 2, 3 (1982).

36. See *In re Ryder*, 263 F. Supp. 360 (E.D. Va.), aff'd, 381 F.2d 713 (4th Cir. 1967) (lawyer an accessory after the fact for moving evidence from his client's safe deposit box to avoid possible seizure).

37. See PROFESSIONAL RESPONSIBILITY, *supra* note 1, § 10.54, *Hypothetical Case 3*.

over after trial, you would be tampering with evidence. If you get rid of it, you would not only be tampering, but would also be an accessory after the fact to the underlying crime. You may have a sixth amendment defense to the former but not the latter.<sup>38</sup>

*Tax Difficulties:* The client pays a \$100,000 fee to the lawyer, but the lawyer files no currency transaction report (CTR) and does not deposit the money in the bank. The client tells the police about the fee. A year later, the police check the CTR files and find that none were filed by the lawyer or by the bank. The lawyer is probably guilty of a crime.<sup>39</sup> Later, the IRS conducts an audit and finds the money unreported. The lawyer is probably guilty of tax evasion.<sup>40</sup>

The moral: You must report any cash fee because you never know when the client will tell the police how he paid you.<sup>41</sup> In filing a CTR, a lawyer *may* be able to assert an attorney-client or self-incrimination privilege as to the client's identity,<sup>42</sup> but there is no privilege as to the amount of money received. As of yet, there is no privilege to not file a CTR that at least provides most of the information.<sup>43</sup>

### III. HOW DOES THE CLIENT DECIDE TO TURN ON THE LAWYER

The client's decision to "rollover" on the lawyer can come from several sources. The client sometimes figures it out for himself or herself and then goes to the police. We all know of the common law enforcement technique in which the first words to a drug courier or low level dealer after "you're under arrest" are: "We'll help you get out of this (or get leniency) if you help us get your source [higher-ups]." Even though the client did not agree to help at first, he or she may know the offer remains open up until final disposition of the case. While preparing the defense, the lawyer can aggravate the situation

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38. *Commonwealth v. Stenhach*, 356 Pa. Super. 5, 514 A.2d 114 (1986), *app. denied*, 517 Pa. 589, 534 A.2d 769 (1987) (sixth amendment right to counsel protected counsel in that situation from being charged since the evidence was actually produced at trial on demand, but lawyers did not handle it very well at all, and they were lucky the appellate court helped them out). *Stenhach* and like cases are discussed in PROFESSIONAL RESPONSIBILITY, *supra* note 1, § 10.53.

39. See 26 U.S.C. § 6050I (Supp. IV 1986) and 26 C.F.R. § 1.6050I-1 (1988) (discussed in PROFESSIONAL RESPONSIBILITY, *supra* note 1, § 6.14).

40. See 26 U.S.C. §§ 7201-07 (1982 & Supp. IV 1986).

41. Several years ago, a lawyer in the vicinity is alleged to have committed suicide shortly after being confronted by the IRS about a substantial cash fee that he failed to report on his income taxes. The IRS apparently learned about the fee from the client.

42. This is still an open question. It appears the IRS has rejected such claims of privilege.

43. PROFESSIONAL RESPONSIBILITY, *supra* note 1, § 6.14.

by doing or agreeing to do something questionable. The client later contacts the police and wants to take the deal without the lawyer being involved (maybe the client knows of the lawyer's moral scruples against rolling over on others<sup>44</sup>). On further questioning of the client by the police, the police feel that the lawyer might obstruct justice or suborn perjury. The police involve the prosecutor, and they all agree that the client will go through with the trial but that no adverse judgment will be entered. Instead, the client will be a government informant, and he will wear a "wire" to lawyer-client meetings and during trial to gain incriminating evidence from the lawyer and others. In effect, the government is willing to lose the underlying case to make a case against the lawyer.

Sound far-fetched? Not at all. It has happened before. There is a case pending in a North Carolina state court involving similar facts, except the informant was a "friendly" defense witness in a DWI case.<sup>45</sup> The DWI defendant was acquitted on that charge with the informant's allegedly perjured testimony, so the prosecutor charged the DWI defendant with perjury and charged his defense lawyer with suborning perjury. The prime evidence against them were tapes of trial preparation sessions recorded by a police "wire" on the informant.

There are other ways in which a client might turn on his lawyer. If a client knows or thinks the lawyer is a crook and is incapable of getting the deal that the police have offered, the client might try to make the deal himself or herself. In addition, the police may go to the client with the offer where the lawyer was not the prime target but becomes one after all.

Defense lawyers might be able to sway juries with informant credibility arguments, but these arguments have very little impact on police and prosecutors when they make the decision to arrest or indict a defense lawyer. Police and prosecutors know the informant is trying to save himself or herself. That's the name of the game.

A few words about entrapment are in order. It is hard to prove entrapment in a criminal case where police influence, or mere opportunity, works on "an ordinary law-abiding citizen."<sup>46</sup> Justifiably, courts have no sympathy for lawyers claiming entrapment. The de-

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44. Such is the official position of the lawyers participating in the National Legal Committee of the National Organization for the Reform of Marijuana Laws (NORML).

45. "Codefendant Recorded Conversations," *Charlotte Observer*, June 29, 1988, at 1c, 4c.

46. MODEL PENAL CODE § 2.13; *Sherman v. United States*, 356 U.S. 369, 383-84 (1958) (Frankfurter, J., concurring).

fense of entrapment admits a violation of ethical standards, and it is contrary to what lawyers are supposed to stand for and how they have been trained to perform.<sup>47</sup>

#### IV. CONCLUSION

When I was a child, I was given the perception that criminal defense lawyers were all crooked. On reflection, I found that this criticism was aimed at only two or three lawyers in my small home town, but the label of "criminal defense lawyer" was always pejorative and it stuck in my mind that way, until I became one. To me as a former nonlawyer, the line between criminal defendants and criminal lawyers was always blurred.

Of course, I do not think about myself as being one of those bad guys. As criminal defense lawyers, we are defenders of rights, the Constitution, the presumption of innocence, and we seek to preserve an effective system of justice that grants the accused a fair trial. I feel

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47. In lawyer disciplinary proceedings, entrapment is no defense at all—it is tantamount to a guilty plea. See, e.g., *In re Porcelli*, 77 Ill. 2d 473, 478, 397 N.E.2d 830, 832 (1979):

It would be difficult to imagine circumstances in which the defense of entrapment would be available to an attorney in a disciplinary proceeding. Attorneys are versed in the law and should be keenly aware of what activities constitute a breach of the law. This knowledge is inconsistent with the central premise of entrapment, i.e., an implantation of criminal intent in the mind of an innocent person. (*Sorrells v. United States* (1932), 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413.) Therefore, in only the rarest of circumstances may an attorney label himself innocent and shield himself with the defense of entrapment.

This is discussed in PROFESSIONAL RESPONSIBILITY, *supra* note 1, § 20.9 and Annot., 61 A.L.R.3d 357 (1975).

In criminal cases involving lawyer defendants, the question has not yet been discussed quite this way. See *United States v. Rosner*, 485 F.2d 1213, 1220-23 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974) (entrapment defense rejected and lawyer convicted of conspiracy, obstruction of justice, and three counts of bribery); *United States v. Jacobs*, 431 F.2d 754, 762 (2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1974) (entrapment defense rejected in conspiracy to bribe IRS agent case); *United States v. Madda*, 345 F.2d 400, 403 (7th Cir. 1965) (entrapment defense rejected in attempted bribery of federal prosecutor); *State v. Olkon*, 299 N.W.2d 89, 107-08 (Minn. 1980), *cert. denied*, 449 U.S. 1132 (1981) (entrapment defense rejected in false insurance claims case). Cf. *Stoner v. State*, 418 So. 2d 171, 180 n.1 (Ala. Crim. App.), *cert. denied*, 418 So. 2d 184 (Ala. 1982), *cert. denied*, 459 U.S. 1128 (1983) (claim of prosecutorial delay over racially motivated church bombing which resulted in death of child; defendant was an attorney, and if entrapment was believed to have been his defense at the time of the occurrence, he should have known he would ultimately be charged so he should have been contacting witnesses long before).

I submit to you that a lawyer pleading entrapment in his own criminal trial is only enduring a slow plea of guilty because the rationale of the disciplinary cases will ultimately make it into a criminal case, and it probably should. Think about it. How can a lawyer argue entrapment without proving his own guilt?

good about what I do, and I am told that other criminal defense lawyers also feel good about what they do.

Yet, I still think about those lawyers, and I occasionally read about them in hometown newspapers at my parents' home. I wonder why I felt that way about them. Are they really crooks? Extending from that, what is the public perception of how criminal defense lawyers handle cases? If criminal defense lawyers are reasonably successful, is it ascribed by the public to their being crooked lawyers who will sacrifice ethics and truth to win a case? Most police officers seem to think that way about criminal defense lawyers, and, while most usually don't care what the police think, that perception likely motivates the police to make targets of criminal defense lawyers.

Canon 7 of the Code of Professional Responsibility provides that "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." For some inexplicable reason, the 1983 Rules of Professional Conduct have no similar language. Do you ever wonder why? Is zealousness a forgotten duty? By the same token, is integrity a forgotten duty?

The NACDL study reported that some lawyers admitted that they limited or eliminated criminal cases from their practice as a result of perceived indirect pressures from the Department of Justice.<sup>48</sup> Who suffers? The clients and the lawyers don't suffer, because any lawyer that weak and pliable has no business being a criminal defense lawyer. As a group and as a part of the criminal justice system, criminal defense lawyers are better off without them. The system of justice suffers because the government knows that its intimidation can work.

Far more is at stake here than gaining one little advantage in one case. As criminal defense lawyers we must be certain that the line between the lawyer and the client does not become blurred or obscured as others perceive criminal defense lawyers—particularly those with the power to do lawyers harm: police, prosecutors, and the courts. Being zealous can and must include being honest and having integrity. A criminal defense lawyer must never let anyone *even think* that he lacks integrity or that he will act to prejudice the administration of justice.

Maintain this ideal and *maybe* criminal defense lawyers will be safe from prosecution.

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48. Genego, *supra* note 1, at 7.

